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JOSEPH F. SPANIOLO
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

ALLENE FIELDS and EARLINE DANIELS,
Petitioners,

v.

**HALLSVILLE INDEPENDENT SCHOOL
DISTRICT, ET AL.,**
Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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**ATTORNEYS FOR
STATE RESPONDENTS**

QUESTIONS PRESENTED

- I. Whether Petitioner school teachers are employed by independent school districts and not by the State of Texas, and therefore have no cause of action against the State under Title VII or the Age Discrimination in Employment Act.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	3
CERTIFICATE OF SERVICE	4

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Broussard v. L.H. Bossier, Inc.</i> , 789 F.2d 1158, 1160 (5th Cir. 1986)	2
<i>Diggs v. Harris Hospital- Methodist, Inc.</i> , 847 F.2d 270, 272 (5th Cir. 1988)	2
<i>Fields v. Hallsville Ind. School Dist.</i> , 906 F.2d 1017, 1020 (5th Cir. 1990), reprinted at Petition for Writ, at A-7-8 .	3
<i>George v. New Jersey Bd. of Veterinary Medical Examiners</i> , 794 F.2d 113, 114 (3d Cir. 1986)	3
<i>Georgia Ass'n of Educators v. Georgia</i> , No. 86-2234A (N.D. Ga., May 20, 1987)	3
<i>Haddock v. Board of Dental Examiners</i> , 777 F.2d 462 (9th Cir. 1985)[.]	3
<i>Mares v. Marsh</i> , 777 F.2d 1066 (5th Cir. 1985)	2
<i>Spirides v. Reinhardt</i> , 613 F.2d 826 (D.C. Cir. 1979)	2
<i>Texas State Teachers Assoc. v. Texas</i> , 711 S.W.2d 421, 425 (Tex. App. -- Austin 1986, writ ref'd n.r.e.)	3
<i>Texas v. Project Principle, Inc.</i> , 724 S.W.2d 387 (Tex. 1987) 3	
<i>Tyler v. Vickery</i> , 517 F.2d 1089, 1096 (5th Cir. 1975), cert. denied, 426 U.S. 940 []	3
<i>Woodward v. Virginia Board of Bar Examiners</i> , 598 F.2d 1345 (4th Cir. 1979)	3

STATUTES

29 U.S.C. § 623(a)	2
42 U.S.C. § 2000e2(a)	2

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* * * * *

RESPONDENTS' BRIEF IN OPPOSITION
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* * * * *

STATEMENT OF THE CASE

The facts underlying this controversy are not in dispute. State Respondents agree with the Statement of the Case as contained in the Petition for Writ of Certiorari, and would only respectfully remind the Court that Respondents Texas Education Agency, Texas Commissioner of Education, Texas State Board of Education, and the State of Texas will be referred to collectively throughout this Brief as "State Respondents."

REASONS FOR DENYING THE WRIT

1. State Respondents have not been Petitioners' employers for purposes of either Title VII or ADEA.

By their own unequivocal language, both Title VII and the ADEA apply only to claims of discriminatory practices by an employer. 42 U.S.C. § 2000e2(a); 29 U.S.C. § 623(a). It thus follows that in order for Petitioners to be able to state any cause of action against State Respondents, the Petitioners must have been employees or potential employees of State Respondents.

The Fifth Circuit has adopted the hybrid economic realities/common law control test, first set forth in *Spirides v. Reinhardt*, 613 F.2d 826 (D.C. Cir. 1979), to determine whether an employment relationship exists. *Diggs v. Harris Hospital- Methodist, Inc.*, 847 F.2d 270, 272 (5th Cir. 1988); *Mares v. Marsh*, 777 F.2d 1066 (5th Cir. 1985). It is true, as Petitioners assert, that the right to control an employee's conduct is the most important factor in determining employee status. *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986). However, that one factor is not determinative. *Id.* The *Spirides/Broussard* test

considers the economic realities of the work relationship, and the extent to which the one for whom the work is being done has the right to control the details and means by which the work is to be performed, with emphasis on this latter control factor.

Diggs, 847 F.2d at 272. The test also involves the application of additional factors, which need not be discussed.

2. Under Texas law, a teaching certificate is a license.

The Fifth Circuit ruled that "the State's role with respect to the TECAT is analogous to that of state bar administrators and other state licensing or certification agencies previously held not to be the employers of unsuccessful test takers under Title VII (or the ADEA). See, e.g., *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975), cert. denied, 426 U.S. 940 []; *Woodward v. Virginia Board of Bar Examiners*, 598 F.2d 1345 (4th Cir. 1979); see also *George v. New Jersey Bd. of Veterinary Medical Examiners*, 794 F.2d 113, 114 (3d Cir. 1986); *Haddock v. Board of Dental Examiners*, 777 F.2d 462 (9th Cir. 1985)[.] *Fields v. Hallsville Ind. School Dist.*, 906 F.2d 1017, 1020 (5th Cir. 1990), reprinted at Petition for Writ, at A7-8.

Petitioners attempt to distinguish these precedents because the licensees here work for a public employer, the independent school district. Under the logic of Petitioners' argument, every licensed employee of a political subdivision of a state is potentially an "employee" of that state. There is no question that the State of Texas exercises great control over its public school system. The Constitution of the State of Texas has created an instrumentality, the "independent school district," which is charged with daily operation of Texas' schools in conformity with the law. Among the exclusive powers of this political subdivision is the authority to hire and fire its own employees. Petitioners point out that Texas' independent school districts receive funds from the State for teacher salaries. While this is true, the school districts also receive federal funds. Does this mean that Texas' teachers are also federal "employees"?

Petitioners argue that "[o]ther courts with the same challenge as that at bar have recognised the economic reality of school teachers' employment," and in support cite only an unreported district court case, *Georgia Ass'n of Educators v. Georgia*, No. 86-2234A (N.D. Ga., May 20, 1987). This case does not provide any precedent whatsoever. First, the district court merely declined to grant summary judgment on the issue. Second, there is no indication that the State of Georgia had defined for the

court what its view of Georgia law was. The Supreme Court of Texas, on the other hand, has directly spoken to this issue. In *Texas v. Project Principle, Inc.*, 724 S.W.2d 387 (Tex. 1987), the Texas Supreme Court held that a teaching certificate "is a license, and like all licenses, is subject to such future restrictions as the state may reasonably impose." *Id.*, 724 S.W.2d at 390. Such restrictions, designed to regulate the teaching profession and the public education system, are a valid exercise of the State's police power. *Texas State Teachers Assoc. v. Texas*, 711 S.W.2d 421, 425 (Tex. App. -- Austin 1986, writ ref'd n.r.e.).

The State of Texas does not become an "employer" merely by the exercise of such police powers. The *Spirides/Broussard* "economic realities" test looks to the kinds of control traditionally exercised by employers over their employees. Petitioners attempt to confuse this issue with a wholly different sort of control, that traditionally exercised by state governments over their political subdivisions. Such controls can not transform the State into an "employer" of its school district's employees.

CONCLUSION

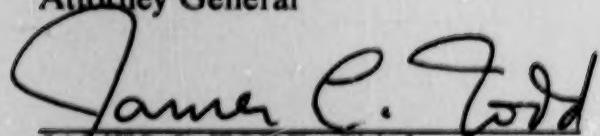
Because no employment relationship exists between the State Respondents and Petitioners, Petitioners could not assert a cause of action against State Respondents under either Title VII or the ADEA, both of which may only be asserted against "employers." The District Court's grant of summary judgment against Petitioners was therefore correct. For these reasons, Petitioners' request for a writ of certiorari should be denied, and the judgment and opinion of the Court of Appeals for the Fifth Circuit should be allowed to stand.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant
Attorney General



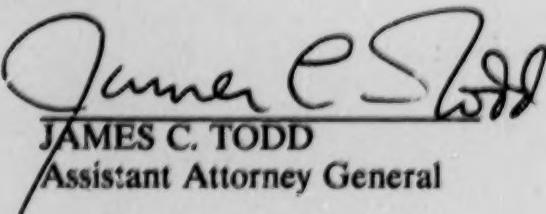
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ATTORNEYS FOR
STATE RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested, on this the 30th day of November, 1990, to:

Mr. Larry R. Daves
Larry R. Daves & Associates
2311 N. Flores
San Antonio, Texas 78212



JAMES C. TODD
Assistant Attorney General